Aerospace Industrial District Lodge 751, International Association of Machinists and Aerospace Workers, AFL–CIO (The Boeing Company) *and* **William A. Holston.** Case 19–CB–4696

31 May 1984

DECISION AND ORDER

BY CHAIRMAN DOTSON AND MEMBERS HUNTER AND DENNIS

On 3 February 1984 Administrative Law Judge Richard D. Taplitz issued the attached decision. The Charging Party filed exceptions, and the Respondent filed an answering brief.[1]

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and brief and has decided to affirm the judge's rulings, findings,[2] and conclusions and to adopt the recommended Order.

ORDER

The recommended Order of the administrative law judge is adopted and the complaint is dismissed.

[1] The Respondent also filed a motion to strike the Charging Party's exceptions in their entirety and particularly to strike certain portions of the exceptions which contain material not introduced into evidence at the hearing. We grant the Respondent's motion to strike the Charging Party's exceptions to the extent of striking the material not in the record and disregarding it in our deliberations. *Beaird-Poulan Division*, 233 NLRB 736 fn. 1 (1977).

[2] The Charging Party has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

DECISION

STATEMENT OF THE CASE

RICHARD D. TAPLITZ, Administrative Law Judge. This case was tried in Seattle, Washington, on November 9, 1983. The charge was filed on January 4, 1983, by William A. Holston, an individual. The complaint, which issued on April 14, 1983, alleges that Aerospace Industrial District Lodge 751, International Association of Machinists and Aerospace Workers, AFL–CIO (Respondent or the Union) violated Section 8(b)(1)(A) of the National Labor Relations Act.

Issue

The sole issue is whether the Union violated Section 8(b)(1)(A) of the Act by refusing to process a grievance concerning the discharge of William A. Holston because Holston was not a member of the Union.

All parties were given full opportunity to participate, to introduce relevant evidence, to examine and cross-examine witnesses, to argue orally, and to file briefs. Briefs, which have been carefully considered, were filed on behalf of the General Counsel and the Union.

On the entire record[1] of the case and from my observation of the witnesses and their demeanor, I make the following

FINDINGS OF FACT

I. JURISDICTION

Holston was discharged by the Boeing Company (Boeing or the Company). The Union refused to protest that discharge through the grievance procedure. Boeing, a Delaware corporation with an office and place of business in Auburn and Kent, Washington, is engaged in the business of manufacturing aircraft. During the year immediately preceding issuance of complaint Boeing had gross sales of goods valued in excess of $500,000. During the same period Boeing directly and indirectly shipped goods valued at over $50,000 to customers outside Washington. The Respondent admits and I find that Boeing is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act. The Respondent is a labor organization within the meaning of Section 2(5) of the Act.

II. THE ALLEGED UNFAIR LABOR PRACTICES

A. *Background*

The Union represents between 17,500 and 29,000 employees of the Company.[2] There are about 45 employees in one subgroup of machinists who are represented by the Union. William Holston was one of those 45. At all material times those 45, as well as other employees, were covered by a collective-bargaining contract dated October 4, 1980. The contract contains a detailed grievance procedure culminating in binding arbitration. The contract also contains a union-security clause. However, Holston, as well as some other employees, were not subject to that clause because of certain "grandfather" provisions of the contract. Holston was hired on October 17, 1977, at a time when the Union was on strike against the Company. He crossed the Union's picket line to take the job and was one of the very few employees in the machinists group who never joined the Union.

In February 1980 Holston was given certain medical restrictions because of allergies, which prevented him from being assigned to the full range of normal duties.

In early December 1981 Union Shop Steward Robert Stoof asked Holston whether Holston would like to join

[1] The caliber of the reporting, as indicated by the first half of the transcript, is exceedingly poor. Though the transcript gives a different impression, counsel and the other participants at the trial were quite articulate. While it is not possible to reconstruct what was actually said at the trial, the key testimony of the witnesses is decipherable. As none of the parties has found it necessary to move to correct the transcript or to move for a new trial for the absence of an adequate transcript, I shall take no action on my own motion.

[2] During the past few years there has been a reduction in employment in the bargaining unit from 29,000 to 17,500.

the Union. Holston replied that Stoof could "take that membership card and stick it where the sun doesn't shine." When Stoof commented that Holston really did not like the Union, Holston replied that as far as he was concerned it was just legalized extortion. About March 1982 Stoof again asked Holston whether he wanted to join the Union. When Holston said that he did not, Stoof replied, "What are you? A fucking freeloader?" Holston replied that he was not a freeloader but that he did not feel that the Union got him his job.

In spite of Holston's attitude toward the Union he appeared to have no reluctance in seeking the Union's help whenever he had difficulty with his Employer. He brought complaints against the Company to the Union on six separate occasions, the last of which involved his discharge. The discharge took place on October 6, 1982. The complaint alleges that the Union failed to process a discharge grievance because of Holston's nonunion status. The Union contends that it treated union and nonunion members the same with regard to the processing of grievances and that Holston's grievance was not processed solely because it believed that the grievance could not be won.

The General Counsel's case has two prongs. One is the testimony of Holston's fellow employee Tom Goddard that indicates that certain union officials were hostile toward Holston because of his nonunion status. The other is testimony, primarily of Holston, that if credited would indicate arbitrary action on behalf of the Union on which an inference might be based that the Union's failure to process Holston's grievance was causally connected to his nonunion status.

Goddard testified that on some unidentified date with regard to some unidentified incident Holston told him that the union steward had refused to help him. Goddard averred that he approached Stoof and said that Stoof had to help any employee whether the employee was union or nonunion, and that Stoof replied that he was not going to help Holston. In his initial testimony Goddard stated that Stoof did not give any reason why he was unwilling to help Holston. After he was shown his affidavit Holston quoted Stoof as saying, "Holston, the scab, wanted me to help him." Stoof did not testify. He has retired and his whereabouts appear to be unknown.

Goddard may have had some bias against both the Company and the Union. The Company had reduced Goddard's position from a leadman to a lathe operator. Goddard had been shop steward but before the incidents in question the Union removed him from that position. He appeared to harbor animosity toward Stoof. He testified that he believed that Stoof would run straight to management with the informatlon if any employee said anything about management and that none of the employees liked Stoof. Though Goddard was the only witness who testified in support of Holston, he averred that he did not believe Stoof discriminated against Holston because of Holston's nonunion status for the reason that Stoof did not do anything for anyone. However, in spite of these reservations, I believe that Goddard was a credible witness. His demeanor was impressive and in a way he was testifying against his own interest. He is a member of the bargaining unit and there is no indication that he would gain anything by testifying against his own Union. However, Stoof's remarks to Goddard were of little consequence. Stoof did not make the decision to refuse to process Holston's discharge grievance. A shop steward has no authority to even file a written grievance. Whenever Holston asked Stoof to contact the union business representative, Stoof did so. That business representative was Creed Munson.[3]

One of Holston's complaints against the Company was that it refused to grant him an unpaid leave of absence for 5 days when he was out sick and had sick leave available. Under the contract the Company paid off unused sick leave at up to 160 percent of an employee's wages. The Union could reasonably have concluded that Holston was attempting to misuse the leave of absence provision of the contract so as to receive premium rather than regular pay for time not worked because of illness. Prior to that time the Union had processed a grievance on behalf of employee William Morton when Morton had been denied a leave of absence. However, in Morton's case, unlike that of Holston, he did not have any sick leave available. Goddard sought to help Holston by obtaining for him some records relating to Morton's grievance. Goddard testified that in late spring of 1982 Munson approached him and asked him what he was doing "helping that fucking scab." In his initial testimony Goddard averred that he was not sure that Munson was talking about Holston. Later in his testimony he averred that he had not helped anyone else who had crossed the picket line. Munson in his testimony denied making that remark to Goddard. Though the demeanor of Goddard and Munson was such as to indicate that both were believable witnesses, I credit Goddard. as indicated above his testimony could result in possible difficulties for himself and could not result in any gain. Munson's remark to Goddard indicated that he did not think very much of Holston. However, it arose in the context of a situation where Munson could have reasonably believed Holston was overreaching and attempting to misuse the contract in order to obtain money to which he was not entitled.

B. *The General Practices of the Company and the Union Concerning Discharges*

The Company has an elaborate procedure with regard to disciplining employees. An initial disciplinary action is an oral warning which is given to the employees and then documented in writing. It cannot be given by a first-level supervisor but must be authorized by the general foreman. If the discipline involves loss of employment, suspension, or other severe action, it has to go through four levels of authority. It must be approved by the supervisor, the supervisor's superior, the superintendent, and then by the labor relations department. Once the Company decides on a discharge, it rarely changes its mind. Because the Company so fully documents its reasons for discharge, it is uncommon for the Union to process a discharge grievance to arbitration. In the year

[3] The Union admits and I find that Munson and Stoof, as well as District President Tom Baker and Staff Assistant John F. Fookes, are agents of the Union within the meaning of Sec. 2(13) of the Act.

and a half before the trial, the Union investigated about 65 or 70 discharges of which 10 or 12 were reduced to grievances. About half of those went to arbitration and about half of those arbitrated were won by the Union. The losing party pays the entire arbitration fee. In making a decision as to whether or not to file a discharge grievance, a business representative investigates the circumstances of the discharge on its merits. If the business representative decides that a grievance is not warranted, the discharged employee is given a written notice and is advised of his right to appeal the business representative's decision to the district president. If an appeal is filed, the entire matter is reviewed by the district president's administrative assistant who makes a recommendation to the district president who can either affirm or reverse the business representative's action. In the appeal procedure the administrative assistant relies on the written statement of the discharged employee and that employee is not re-interviewed.

C. *Holston's Problems Prior to the Discharge*

1. Credibility considerations

The complaint does not allege that the Company violated the Act and the Company's reasons for disciplining and then discharging Holston are not in themselves relevant to this proceeding. However, if those reasons were sufficiently without foundation, an inference may be warranted that the Union's lack of protest was based on some improper reason rather than a legitimate evaluation that the employee's complaint did not present a valid basis for processing a grievance.[4]

There was a sharp conflict in testimony between Holston on the one hand and Company Supervisors Frank Dean and Larry Morasch on the other with regard to the incidents that gave rise to the disciplinary actions against Holston. Some preliminary comments on credibility are therefore appropriate.

Holston's demeanor as he testified did not enhance his credibility. He appeared to have a monumental capacity to rationalize his difficulties by attributing their causes to others rather than himself. Parts of his testimony were patently unbelievable. With regard to the sick leave-leave of absence incident discussed above, he was asked why he desired unpaid leave of absence rather than paid sick leave for the time he was absent. He answered in a rather vague fashion without any mention of the fact that he could be paid premium pay for unused sick leave. That fact came out only later in the trial. On cross-examination he testified that he had not read so far into the contract as to know that there was premium pay paid for unused sick leave. After listening to Holston's testimony as a whole, I am convinced that his assertion was not worthy of credence. His many protests against company actions indicated that he was very aware of the contract's terms and was prepared to cut any corners he could in using them to his advantage. In sum, based on both Holston's demeanor and the parts of his testimony that indicated an intent either to mislead or to misstate the facts, I am unprepared to credit him where his testimony differs from that of Company Supervisors Dean and Morasch. I am also unprepared to credit him where his testimony differs from that of Business Representative Munson. Though Munson was not fully credible with regard to his conversation with Goddard, I only have some reservations with regard to the credibility of Munson. I have no confidence in Holston's veracity. As between the two of them, I have no hesitation in crediting Munson. The findings set forth below are therefore based on the Company's records and on the testimony of Dean, Morasch, and Munson. I have fully evaluated all of Holston's justifications and excuses for himself as well as his recriminations, against others and where they conflict with the testimony of Dean, Morasch, or Munson, or with company records, I do not credit Holston.

2. The incidents

a. *The handwork*

In September 1981 Company Supervisor Larry Morasch assigned Holston to certain handwork involving the burring of parts. Holston replied that he was hired to run a machine and not to burr parts. On several occasions when Morasch insisted that Holston do handwork the same as the other machinists, Holston claimed to develop a tennis elbow or a blister that required his absence for medical attention. Supervisor Frank Dean also assigned work to Holston. He believed that Holston was dragging his feet with regard to certain assignments and that he was misusing his medical restriction. On Dean's recommendation Holston was given an oral warning on September 24 which was documented in a corrective action memo which read in part:

> II. SUPERVISORS COMMENTS:
>
> A meeting was held in Mr. Smith's office on 9/23/81 at 3:30 p.m. Personnel and Job Placement Representatives, your General Supervisor, Line Supervisor and yourself were in attendance. In this meeting you were advised by your supervisor that your work performance has not been acceptable within the full scope of your job assignments. You have been balking at and dragging out the handworking assignments that you have been given during the times when your regularly operated machine has been down due to maintenance and load problems. You are expected to perform every job assignment in an efficient, satisfactory manner. You were also told that your performance on the machine has been below what is expected. You have not been planning your moves and are taking excessive time to load and unload parts. You have had excessive machine idle time while you play with the machine computer making unnessary [sic] transac-

[4] Unions do have a wide range of discretion in determining whether or not to process a grievance. In *Ford Motor Co. v. Huffman*, 345 U.S. 330, 338 (1953), the U.S. Supreme Court stated: "A wide range of reasonableness must be allowed a statutory bargaining representative in serving the unit it represents, subject always to complete good faith and honesty of purpose in the exercise of its discretion." In *Humphrey v. Moore*, 375 U.S. 335, 349 (1964), the same Court held: "Just as a union must be free to sift out wholly frivolous grievances which would only clog the grievance process, so it must be free to take a position on the not so frivolous disputes."

> tions. You are expected to plan your moves and keep your machine running as efficiently as possible, making efficient use of company time and equipment.
>
> III. CORRECTIVE ACTION REQUIRED
>
> You must show an immediate improvement in your work performance or further corrective action will be taken, up to and including termination.

Shop Steward Stoof was present when the oral warning was given.

On the following day Holston asked Stoof whether there was anything he could do about it. Stoof replied that it would be best not to make waves and that there was nothing Stoof could do. Holston could have asked Stoof to call in the business representative, who was the only one with authority to file a written grievance. However, Holston chose not to do so.

b. *The October 20 absence*

On October 20, 1981, Holston was ill and absent from work. Under outstanding company policy, absences beyond a certain number are considered an infraction regardless of the reason. On October 21 Holston was given a letter signed by his supervisor Morasch which stated:

> Subject: Company Rule Violation—Neglect of Duty—Attendance Oral Warning
>
> William A. Holston was informed that 6 reported absences and leaving early 2 days since transferring to 2-2165 on July 27, 1981 is unsatisfactory attendance and that he must take corrective action to prevent further disciplinary action.

Holston spoke to Stoof about the letter and Stoof told him that it would be best not to make waves over it. Again Holston did not request that the business representative take up the matter.

c. *The January 28 and 29 damage to material*

On January 28, 1982, Holston had trouble with his machine and called an area man. Supervisor Frank Dean was also there. When the machine was out of position, Holston pushed the cycle start button with the result that materials were damaged. Though Holston claimed there was a malfunction in the machine, the Company's maintenance people checked the machine and could find no problem. They were unable to cause the error to be repeated.[5] The following day, January 29, Holston damaged some other parts. He testified that he set it up wrong but it was not his fault because he was "being rushed and stuff."

On February 2, 1982, Holston received a written corrective action memo for the two incidents which read:

> On 1-28-82, while showing your Area Man and Supervisor what you felt was a machine malfunction problem, you used poor judgment in pressing the cycle start with the cutters directly over the parts. Ref 232-31092-23 RAM #660144T, #661127T, and 660218T. This resulted in the cutter feeding into the parts and leaving a spherical gouge approximately .045 deep in the surface of three wings. On 1-29-82 you were responsible for undercutting three 232-31092-23, RAM #660747T, #550220T, and 661230T wings by using the wrong setting on the 2.100 set block at your cutter checks for Files 4-2, 4-3, 4-4. This poor judgment and careless workmanship will result in the rejection of and probable scrap of six bonded wings.
>
> III. CORRECTIVE ACTION REQUIRED.
>
> This careless workmanship and poor judgment will not be accepted. Future errors of this nature will result in further disciplinary action which may include termination.

When Holston received the disciplinary letter, he told Shop Steward Stoof about the letter and asked him to call the business representative so that a grievance could be filed. Stoof did as Holston asked and the following day Business Representative Munson came to the plant and spoke to Holston. Holston told him that he received the letter of reprimand when his machine malfunctioned and some parts had to be scrapped. He said that it was not his fault because the machine was not operating properly. Munson examined the disciplinary letter and then undertook an investigation. He spoke to Goddard who told him that it might have been one way or another. He spoke to the maintenance people who spent 2 or 3 hours unsuccessfully looking for a malfunction and he checked the Company's logs. Munson could not find any basis for arguing that there was a program or machine error and he decided that if he took the matter to arbitration the Union would probably lose. He told Holston that he had decided not to grieve the matter.

d. *The leave of absence request and the change of shoes*

On February 12, 1982, Supervisors Dean and Morasch saw Holston changing his shoes at a time when he should have been paying attention to the machine he was running.

On February 15 Holston did not work because of sickness. His doctor told him that he had the flu and would be out for a week or two. He called his supervisor Frank Dean and requested a leave of absence. Dean asked him whether he wanted to cover the time with vacation or sick leave and Holston said that he did not. Holston was denied the leave of absence and was out of work from February 15 through February 19, 1982. On February 25 he was given the following letter of reprimand:

> Subject: Company Rule Violation—Neglect of Duty—Unacceptable Attendance and Misuse of Company Time.
>
> William Holston, you were given an oral warning on October 21, 1981 for unacceptable attendance

[5] Goddard, who also witnessed the event, testified that he could speculate that the machine malfunctioned. That speculation cannot overcome Supervisor Dean's credible and unequivocal testimony to the contrary.

since transferring to Organization 2-2165. Since that date your attendance is still unacceptable as indicated by the following:

Date	*Absence*	*Tardy*	*Leave Early*	*Comments*
1-28-82			X	
2-15-83	X			Excused per Doctor's letter
2-16-82	X			"
2-17-82	X			"
2-18-82	X			"
2-19-82	X			"
Total	5		1	

Your attendance since October 21, 1981, combined with your attendance since that date total 11 days absent and 3 leave earlies. This excessive absenteeism, even though authorized and/or reported, causes unacceptable performance of your work assignment. Your job is important and your absence affects your group's ability to meet production schedules.

In addition, on February 12, 1982, you were observed by your supervisor changing your shoes five minutes prior to the end of your shift. This a violation of Shop Policies and Practices (Item 2) which you received a copy of on January 15, 1982, and a Violation of Company Rules—Misuse of Company Time.

It is your responsibility to be at your work station on time each day. You are to be productive from *3:30 p.m.* through *12 midnight*, with the exception of your break at *5:30 p.m.* to *5:40 p.m.* lunch *7:30 p.m.* to *8:00 p.m.*; and break *10:00 p.m.* to *10:10 p.m.* In the event you do not have enough work to be productive, it is your responsibility to contact your supervisor to acquire additional work assignments. The Boeing Company pays you for eight hours of work and the Company will not tolerate or accept less than eight hours of productivity. If you have personal or medical problems for which you would like professional counseling, you are encouraged to contact Boeing Medical for an appointment.

Failure to correct and sustain your attendance and any future Company rule violations will be subject to disciplinary action which could include termination.

On the same day Holston told Stoof that the Company had given him a letter for attendance when he was on leave of absence and that he wanted to talk to the business representative and file a grievance. Holston met with Munson and took the position that he should have been on leave of absence. With regard to the changing of shoes Holston took the position that the machine was running and he was not wasting anybody's time.[6] Munson investigated both the shoe changing and the leave of absence incidents. With regard to the shoe changing he concluded that Holston should not have put safety caps on the type of shoes that he was changing into and that he had changed shoes while the machine was running. With regard to the leave of absence Munson concluded that Holston was not entitled to it. He testified that the leave of absence provisions of the contract were intended to cover long-term absences in situations where the employee did not have sick leave available. When Munson asked Holston why he did not use his sick leave to cover the 5 days, Holston said it was because he chose not to and he wanted the leave of absence. As is noted above, the Company pays a premium in cash for unused sick leave at up to 160 percent of full-time pay. Munson concluded that an employee has no cause for complaint if he has sick leave available and the Company refuses to grant him leave of absence for a short absence. Munson did not file a grievance on behalf of Holston.[7]

e. *The April 7 talking incident*

On April 7, 1982, Supervisor Morasch saw Holston away from his work area talking to another employee when Holston was supposed to be at his machine. Morasch credibly testified that he took the matter seriously because of all of Holston's prior infractions. On April 12 Holston was suspended for 1 day for "Company Rule Violation—Neglect of Duty—Misuse of Company Time." He was given a letter which stated:

Subject: Company Rule Violation—Neglect of Duty—Misuse of Company Time

On January 15, 1982, you were given a copy of Shop Policies and Practices which states that each employee is to remain working until formal work breaks and lunch periods.

On February 12, 1982 you were observed by your supervisor, changing your shoes five minutes before the end of your shift. On February 23, 1982, you were given a written memo for Company Rule Violations—Neglect of Duty—Unacceptable Attendance and Misuse of Company Time, which reminded you that the Company pays you for eight hours of work and will not tolerate or accept less than eight hours of productivity.

On April 7, 1982, at approximately 7:25 p.m. you were observed by your supervisor, Larry Morasch, away from your assignment at Machine #16, engaging in conversation with another employee at Machine #12 as he was preparing to leave early as authorized by his supervisor.

The above two (2) incidents, on February 12, 1982 and April 7, 1982 are, as you know, Misuse of Company Time which is listed under Neglect of Duty in the Company Rules. Your attitude toward

[6] There was also some rather confused testimony concerning whether Holston could properly wear safety caps on the tennis or running shoes into which he changed.

[7] As is set forth above, the Union did file a grievance because of the Company's refusal to grant leave of absence to another employee, William Morton. However, Morton did not have sick leave available to him and Holston did. The situations were not comparable.

your assignment is poor and your actions show a general disrespect for rules and authority.

Due to the above, you are being suspended for one day, April 13, 1982, leave without pay. Bill, any further Company Rule Violations could result in termination.

On April 15 Holston asked Stoof to call Munson. A few days later Munson came to the plant and Holston told him about the suspension. Munson replied that Holston should probably not have been out of his area. Holston, Munson, and Stoof then met with Supervisor Morasch and Personnel Representative Sorenson. The 1-day suspension was left intact.[8]

D. *The Incident that Precipitated the Discharge*

On October 1, 1982, Holston jammed the machine he was working on. Holston claimed it was a machine error but from Supervisor Dean's point of view Holston's action was a blatant misuse of the machine. Dean had witnessed the entire incident. When he asked Holston why Holston had run the cutters down, Holston replied that he wanted to see what would happen. Though Holston testified that the machine contained additional tools that were not needed for the job, Dean credibly averred that the machine is designed to hold more tools than are going to be used on a particular job and that, if the machine picks up the wrong tool, the operator can simply stop the machine and correct the problem. Because Holston failed to do that, the machine was idled for about 2-1/2 hours. There was no damage to parts.

On October 4, 1982, Dean recommended that Holston be discharged. The letter to the personnel representative read:

> William Alford Holston was given the following warnings for Company Rule Violations of Unacceptable Attendance—Neglect of Duty—Unacceptable Performance—Misuse of Company Time:
>
> | | |
> |---|---|
> | September 24, 1981 | Work Performance/Oral |
> | October 21, 1981 | Unacceptable Attendance/Oral |
> | February 2, 1982 | Work Performance/Written |
> | February 24, 1982 | Unacceptable Attendance/Written |
> | April 12, 1982 | Neglect of Duty—Misuse of Company Time (1 Day Suspension) |
>
> Since these warnings, Mr. Holston has failed to comply with company rules and maintain acceptable performance and accomplish his work in an efficient, satisfactory, acceptable manner consistent with productive use of company time and equipment. Mr. Holston's actions have caused damage to parts and equipment through negligence.
>
> On June 23, 1982, while running Machine #18, William Holston was responsible for gouging three eleven housings in the hemstitch area of sequence 3 media 1. Mr. Holston re-entered his part too rapidly. This was negligence and poor judgment on Mr. Holston's part.
>
> On October 1, 1982, while running machine #20, Mr. Holston loaded three wheel cutters, which were completely foreign to the job he was running, and ran them down into the vacuum plates he was making to the point that it overheated the Z Axis Drive and dumped the machine electronics. Two maintenance calls resulted from this action, and the machine was down from 9:00 p.m. until 11:30 p.m. loss of productivity through willful negligence cannot be tolerated. When asked why he did it, Mr. Holston's reply was "I wanted to see what it would do." The action itself was a total misuse of company time that could have resulted in injury to himself and other employees, extensive damage to the machine, fixtures and cutters.
>
> As a result of William Holston's past performance record and the more recent incidents, I recommend that he be terminated under codes 21 and 31.

Holston was discharged on October 6, 1982.

E. *The Union's Actions with Regard to the Discharge*

On October 7 Holston called Business Representative Munson on the telephone and told him that he had been discharged the day before. Munson asked him what happened and Holston replied that the machine had screwed up again. Later that day Holston went to the union office and spoke to Munson for 30 to 45 minutes about his version of the reason for the termination.[9] Basically Holston told Munson that the machine had screwed up again and they had fired him for it.

Munson then called the company representative and asked for the file on Holston. By asking for the file Munson suspended the time limitation for the filing of grievances. When the file was given to Munson, he reviewed the entire personnel folder and made extracts from it. He called Holston and told him that he had reviewed the folder, that he was going to go to the shop, and that he would get in touch with him on October 17 or 18.

Munson, together with Shop Steward Stoof, went to the shop to investigate the situation. He started by telling Supervisor Dean that he was there to investigate to see if there were grounds for a formal grievance concerning Holston's discharge. Munson and Dean went over each of the incidents and the various memos relating to Holston's employment. They discussed it for 15 or 20 minutes. Munson then went into the shop and spoke to some of the other operators. He had a conversation with the maintenance crew who had checked out the alleged malfunction on Holston's machine. They told him that they had spent 2 or 3 hours trying to get the machine to malfunction the way Holston said it had and they they could not do so. Munson spoke to the steward of the mainte-

[8] These findings are based on the testimony of Holston. Munson testified that he did not recall the 1-day suspension incident.

[9] Holston testified that he told Munson that he wanted to explain his feelings about the termination and that Munson replied that Munson did not want to hear it and that he would have to look at the folder for the reasons for the termination. I do not credit Holston.

nance crew on the day shift who had handled the matter and went over the steward's records. Nothing in Munson's investigation supported Holston's version of the machine malfunction.

On the basis of his entire investigation, Munson decided that Holston did not have a grievance that the Union could win. On October 26, 1982, Munson called Holston and told him the conclusion he had reached. Munson then sent Holston a letter which read:

> You recently informed me of your termination from the Boeing Company on a "Code 21" Company Rule Violation.
>
> After reviewing your folder with the Corporate Labor Relations Office I found the following warnings for Unacceptable Performance, Misuse of Company Time, and Unacceptable Attendance:
>
> | | |
> |---|---|
> | September 24, 1981 | Work Performance/Oral |
> | October 21, 1981 | Unacceptable Attendance/Oral |
> | February 2, 1982 | Work Performance/Written |
> | February 24, 1982 | Unacceptable Attendance/Written |
> | April 12, 1982 | Neglect of Duty—Misuse of Company Time—(1 Day Suspension) |
> | June 23, 1982 | Neglect of Duty |
> | October 1, 1982 | Misuse of Company Time |
>
> The Company has stated that they would not reconsider your termination, and in view of the Company's consistent policy in this matter, the Union does not have grounds to file a grievance on your behalf.
>
> You have the right to appeal my decision. In order to appeal, you must file a written statement of facts and reasons in support of the appeal. Your appeal should be addressed to:
>
> Tom Baker, District President
> 5502 Airport Way South
> Seattle, WA 98108
>
> The appeal must be filed within fourteen (14) calendar days from the date of this letter. "Filed" means received by Mr. Baker's office. An untimely appeal will not be considered.

Holston hired an attorney to pursue an appeal from the business representative's decision not to file a grievance. With a two-page single spaced letter dated November 3, 1982, the attorney filed a formal notice of appeal and gave a point-by-point analysis of each of the incidents in question from Holston's point of view.[10] The appeal was assigned to John Fookes, the administrative assistant to the district president. He had a full statement of Holston's position from Holston's attorney and he made no effort to re-interview Holston. His usual practice was to accept the written statement of the employee who was presenting the appeal. Fookes then reviewed the entire file and interviewed Shop Steward Dennis Martinson, the company supervisor, and Business Representative Munson. Altogether he spent 2 or 3 hours discussing the situation with various management people. On the basis of his entire investigation Fookes concluded that Munson had done his job properly and that a grievance ought not be filed. He made that recommendation to District President Baker and Baker confirmed Munson's actions.

At the time that Munson refused to file a grievance and the time that Fookes came to the conclusion that Munson was correct, both of them knew that Holston was not a union member. Each of them testified that that fact had nothing to do with his decision.

F. *Analysis and Conclusions*

The threshold question is whether the General Counsel has established a prima facie showing that the Union was motivated at least in part by Holston's nonunion status when it refused to process his discharge grievance. Analogizing to an 8(a)(3) violation when an employer discharges an employee because of union activity, a prima facie case can be established by proof of protected activity, employer knowledge of that activity, and employer animus toward the union.[11] However, no rigid formula can be used in determining whether a prima facie case has been made out. The degree of animus, the circumstances under which it is expressed, and all the surrounding circumstances must be considered.

In the instant case Holston did engage in protected activities. In 1977 he crossed the Union's picket line to accept employment. Thereafter he consistently refused to join the Union. The Union had knowledge of that protected activity.

Shop Steward Stoof and Business Representative Munson both indicated a degree of hostility toward Holston by referring to him as a scab. Stoof told fellow employee Goddard that he was not going to help Holston and Munson asked Goddard why Goddard was helping Holston. However, neither of those remarks was made in the context of Holston's discharge or the failure to process his discharge grievance.

Stoof could not be accused of wrongfully failing to process the discharge grievance. He had no authority even to file such a grievance. All he could do was contact the business representative who was in the position to file such a grievance. When Holston asked Stoof to contact the business representative, Stoof did so. With regard to the discharge, Holston contacted the business representative directly.

Munson's reference to Holston as a scab referred to Holston's crossing of the picket line some 6 years previously. His questioning of Goddard as to why Goddard was helping Holston was not raised in the context of

[10] In substance the letter claimed that the discharge was because of Holston's physical handicap and that all of the reasons asserted by the Company were pretexts.

[11] As the Board held in *Associated Milk Producers*, 259 NLRB 1033, 1035 (1982):

> The elements of protected activity on the part of the discharged employee, employer knowledge of the protected activity, and employer animus toward the Union, taken together, are sufficient to establish a *prima facie* case of unlawful discharge.

Holston's discharge. Goddard was helping Holston in connection with Holston's claim that he should have been given a leave of absence to cover sick days so that he would not have to use his sick leave. As is set forth above, that could be reasonably construed as an attempt to misuse the intent of the contract so as to secure premium pay for days lost to illness that should have been paid under the sick leave provision of the contract.

There is no allegation in the complaint that the Union's failure to process Holston's grievances prior to the discharge constituted a violation of the Act. The General Counsel developed evidence relating to those incidents in an attempt to show that the Union acted so arbitrarily with regard to Holston's complaints that there was a pattern of discrimination against him and that such pattern put in context the Union's action with regard to the discharge. However, the evidence which is set forth in detail above fails to establish that the Union acted arbitrarily or even unreasonably with regard to any of those prior incidents.

The key question is whether there was any causal connection between the Union's hostility against Holston because of his protected activity and its failure to process his grievance. The degree of hostility is relevant in making that determiantion. Here the only evidence of hostility were the remarks of the shop steward and the business representative to Goddard. Neither of the remarks was made in the context of the discharge situation and neither could be considered particularly virulent. Those remarks are much less important than the actions the Union actually took with regard to the discharge.

The General Counsel has not established by a preponderance of the credible evidence that the Union treated Holston any different from the way it treated union members. The General Counsel has not established that the Union's defense was so unsubstantial that an inference was warranted that the Union's actions were improperly motivated. The General Counsel has not established that the Union's actions were arbitrary or unreasonable with regard to Holston. In sum I find that the General Counsel has not established even a prima facie case.

Assuming for the purpose of argument that the protected activity, the union knowledge, and the limited union hositlity toward Holston were, under the circumstances set forth above, sufficient to establish a prima facie case that the failure to process the grievance was partially motivated by Holston's protected activity, the Union's defense would be sufficient to rebut that prima facie case. The Company has an elaborate multistep procedure for deciding on discharge. When such a decision is made, the Company generally sticks by it. The Union knows that the Company elaborately documents the reasons for such discharges and the Union's practice is to be very selective in deciding which grievances to process. With regard to Holston's complaints that preceded the discharge, Shop Steward Stoof performed the limited function that was required of him. When Holston asked him to call the business representative, he did so. When those matters were brought to Business Representative Munson's attention, he came to the plant, spoke to Holston, and then investigated by interviewing the other people concerned. There was no credible showing that he acted unreasonably or arbitrarily. With regard to the discharge Munson listened to Holston's position in the initial telephone call and then in a detailed conversation in the union office. Munson investigated the situation and spoke at length to both management officials and other employees who had knowledge of the situation. He reviewed the entire company file on Holston. His conclusion that Holston did not have a winable grievance was neither unreasonable nor arbitrary. His testimony that his evaluation was uninfluenced by his knowledge that Holston was not a union member was quite credible.

When Holston appealed Munson's refusal to process the grievance, the Union's administrative assistant Fookes made an independent investigation. In the appeal procedure the appellant is not interviewed but his written statement is considered. Here Holston filed his written statement through his attorney. Fookes reviewed Holston's file, independently interviewed company officials and other employees, and reached the same conclusion that Munson had. On his recommendation District President Baker refused to upset Munson's decision.

In cases such as this, which turn on the question of improper motivation for a respondent's action, the General Counsel is required to make a prima facie showing sufficient to support the inference that protected conduct was "a motivating factor" in causing that action. Once the General Counsel has established such a prima facie showing, the burden is shifted to the respondent to demonstrate that the same action would have taken place even in the absence of the protected conduct. *Wright Line*, 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982); *NLRB v. Transportation Management Corp.*, 103 S.Ct. 2469 (1983).

For the reasons set forth above I do not believe that the General Counsel has established a prima facie case. However, even if such a prima facie showing could be found, the Union has demonstrated by credible evidence that it would have refused to process Holston's grievance even if Holston had not crossed the picket line in 1977 and even if Holston were a union member. I shall therefore recommend that the complaint be dismissed in its entirety.

CONCLUSION OF LAW

The General Counsel has not established by a preponderance of the credible evidence that the Union violated the Act as alleged in the complaint.

On these findings of fact and conclusion of law and on the entire record of this case, I issue the following recommended[12]

ORDER

The complaint is dismissed in its entirety.

[12] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.